Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CAROL KOLODZIEJ,

Petitioner,

v.

EDWARD J. REINES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is an award of a pension interest in a state matrimonial proceeding a form of alimony, maintenance and support which is otherwise not dischargeable in a Chapter 13 Bankruptcy Proceeding under 11 U.S.C. § 523(a)(5)?

Is an award of a property interest in a Debtor's pension in a state matrimonial proceeding a separate property interest of the non-debtor ex-spouse, which is otherwise not a part of the Debtor's Bankruptcy Estate under 11 U.S.C. § 541(b)(1) and (d)?

PARTIES TO THE PROCEEDING

The only parties to this proceeding are CAROL KOLODZIEJ, Petitioner and her ex-husband, EDWARD J. REINES. Though the Office of the U.S. Trustee for the Northern District of Illinois and the local Chapter 13 Trustee had a right to participate in the lower court proceedings in the U.S. Bankruptcy Court, the U.S. District Court for the Northern District of Illinois, and the U.S. Court of Appeals for the Seventh Circuit, both the U.S. Trustee and the local Chapter 13 Trustee declined to exercise their right to participate.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at *In Re: Reines, Kolodziej v. Reines*, 142 F.3d 970 (7th Cir. 1998) (Appendix A). The unpublished opinion of the U.S. District Court for the Northern District of Illinois is reported at *In Re: Reines, Kolodziej v. Reines*, 1997 WL 543074 (N.D. Ill., August 28, 1997) (Appendix B). The unpublished opinion of the U.S. Bankruptcy Court for the Northern District of Illinois is reported at *In Re: Reines, Kolodziej v. Reines*, 1997 WL 106715 (B.C. N.D. Ill., March 6, 1997) (Appendix C). An Order denying Petitioner's request for rehearing was entered by the Court of Appeals on May 26, 1998 (Appendix G).

STATEMENT OF JURISDICTION

The Judgment of United States Court of Appeals for the Seventh Circuit was entered on April 17, 1998. The Court of Appeals denied a timely petition for rehearing on May 26, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 507 Priorities.

(a) The following expenses and claims have priority in the following order: * * *

(7) Seventh, allowed claims for debts to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a government unit, or property settlement agreement, but not to the extent that such debt—

(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.

11 U.S.C. § 523 Exceptions to discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt— * * *

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act [42 U.S.C. § 608(a)(3)], or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance or support, unless such liability is actually in the nature of alimony, maintenance or support; * * *

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a government unit unless—

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C. § 541 Property of the estate

* * *

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor; * * *

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 1322 Contents of plan

(a) The plan shall— * * *

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title [11 U.S.C. § 507], unless the holder of a particular claim agrees to a different treatment of such claim.

STATEMENT OF THE CASE

The fundamental question in this case is the proper bankruptcy characterization to be afforded a marital obligation arising from a marriage dissolution action involving a division of a pension interest. Petitioner's has argued below that the pension interest which was awarded to her by agreement in a state matrimonial proceeding is either (a) a form of alimony or maintenance which is not subject to discharge in her ex-husband's bankruptcy proceeding, or (b) represents an independent property interest which is simply not a part of her ex-husband's bankruptcy estate.

A.

Pre-Bankruptcy Background

Carol Kolodziej and Edward Reines were originally married on September 2, 1963. On February 1, 1985, a Judgment for Dissolution of Marriage was entered in the Circuit Court of Cook County, Illinois dissolving the parties' marriage. The Judgment of Dissolution of Marriage incorporated a written Marital Settlement Agreement dated January 25, 1985.

Subsequent to the entry of the original Judgment of Dissolution of Marriage, Carol Kolodziej came to learn that her husband had deceived her as to the parties' marital wealth and income. Subsequent litigation ensued, including an appeal to the Illinois Appellate Court. The decision of the Appellate Court vacated all aspects of the final judgment order with the exception of the dissolution of the marriage. The case was remanded to the trial court for further proceedings with

respect to the division of the parties' wealth, debts, as well as for consideration of maintenance, child support and child custody.

The parties ultimately reached a subsequent settlement wherein they redivided their property, allocated their debts, and provided for maintenance, child support, and child custody. A Supplemental Judgment for Dissolution of Marriage was entered in the Circuit Court of Cook County, Illinois on November 15, 1990 incorporating the parties' Supplemental Marital Settlement Agreement.

The crux of the dispute between the parties which has spawned all the litigation between the parties stems from the parties' treatment of a pension earned by Edward Reines as a Chicago Policeman. As a sworn member of the Chicago Police Department, Edward Reines earned a public pension for his years of service to The City of Chicago. His ex-wife, Carol Kolodziej acquired a marital interest in the pension which was earned during the course of their marriage.

Within the body of the parties' Supplemental Judgment for Dissolution of Marriage (Appendix F), the parties agreed to dispose of the pension as follows:

> 3.1 Wife shall receive one-half (1/2) of Husband's pension through his employment with the City of Chicago, Chicago Police Department based upon the value of said pension on February 1, 1985. Said pension plan shall be subject to a Qualified Domestic Relations Order to be prepared and entered subsequent to the entrance of this Judgment for Dissolution of Marriage.

In conjunction with the entry of the Supplemental Judgment for Dissolution of Marriage in the Circuit

Court of Cook County, Illinois on November 15, 1990, the trial court also entered, by agreement, a Qualified Domestic Relations Order to carry out the spirit and intent of the parties' agreement to provide Carol Kolodziej with a protected pension interest. Carol Kolodziej was to begin receiving pension benefits upon Edward Reines' fiftieth (50th) birthday. He turned fifty in January, 1991. Monthly pension benefits should have begun being paid to Carol Kolodziej on February 1, 1991.

Subsequent to entry of the Supplemental Judgment for Dissolution of Marriage, Carol Kolodziej came to learn that the payment program with respect to the promised pension as provided for in the Qualified Domestic Relations Order was unenforceable under Illinois law. The Qualified Domestic Relations Order did not "attach" to the public pension due to a quirk in Illinois law. Public pensions such as the Chicago Police Pension in which Edward Reines participated are not governed by the provisions of ERISA which otherwise provides for the division of certain pensions in conjunction with marriage dissolution proceedings. 29 U.S.C. § 1003(d)(1); 29 U.S.C. § 1056(d)(3).

Though the parties clearly intended for Carol Kolodziej to have a protected pension interest for the remainder of her natural life, the original means by which the pension interest was to be protected was unenforceable under Illinois law. In 1993, Carol Kolodziej returned to the Circuit Court of Cook County, Illinois to seek supplemental relief in the Family Court to address the injustice present in the Supplemental Judgment for Dissolution of Marriage. Supplemental relief was required to provide

Carol Kolodziej with an alternative form of payment of the promised pension.

The end result of the subsequent litigation was the entry of a Judgment Order in the Circuit Court of Cook County, Illinois on April 11, 1995 requiring Edward Reines to pay a lump sum maintenance benefit in the sum of $137,500.00.[1] This payment order was designed to provide a financial equivalent to Carol Kolodziej who was denied direct access to the public pension even though she had obtained a vested interest in same as a part of the parties' Supplemental Marital Settlement Agreement which was approved by the court and incorporated verbatim in the Supplemental Judgment for Dissolution of Marriage.

B.

Bankruptcy Litigation History

Edward Reines filed a Chapter 13 Bankruptcy action in the U.S. Bankruptcy Court for the Northern District of Illinois on August 13, 1996. He listed as his principal unsecured creditor his ex-wife, Carol Kolodziej. Her claim was scheduled at the face value of the payment order of $137,500.00. The claim was subsequently con-

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[1] Cross-Appeals were taken by the parties regarding this Order to the Illinois Appellate Court. In an opinion entered on July 21, 1997, the Court vacated the dollar award and remanded the case to the trial court to recalculate the pension award and the program of payment. This action does not make moot the vested pension rights of Carol Kolodziej. Her rights to a pension were confirmed by the Appellate Court. Only the amount and method of payment are at issue.

firmed by the U.S. Bankruptcy Court in the sum of $143,539.17 which included statutory interest.

In the initial Bankruptcy Proceeding, Carol Kolodziej filed a complaint to determine dischargeability of debt. The Complaint stated that the matrimonial obligation due from Edward Reines was a maintenance obligation which is non-dischargeable under 11 U.S.C. § 523(a)(5). She also filed a companion objection to Plan confirmation as her ex-husband's Chapter 13 Plan proposed to pay her only approximately 50% of the scheduled matrimonial obligation. Chapter 13 Plans must provide for the full payment of all priority expenses under 11 U.S.C. § 1322(a)(2). Maintenance obligations are classified as priority expenses which must be paid in full as a part of a confirmed Chapter 13 Plan. 11 U.S.C. § 507(a)(7).

The Bankruptcy Court denied the complaint to determine dischargeability of debt, and found that the pension interest awarded Carol Kolodziej was a mere division of marital property, and not in the nature of a protected maintenance obligation. In a companion Order, the U.S. Bankruptcy Court confirmed the Chapter 13 Plan.

Carol Kolodziej appealed the adverse ruling of the U.S. Bankruptcy Court to the U.S. District Court for the Northern District of Illinois on March 17, 1997. No hearing was held in the U.S. District Court. The case was considered on the briefs filed by each party. The U.S. District Court issued its ruling on August 28, 1997 sitting as a Court of Review. The U.S. District Court held that the matrimonial obligation owed by Edward Reines was properly characterized as a division of

marital property which would otherwise place Carol Kolodziej in the place of an unsecured creditor seeking payment of a claim against her ex-spouse Debtor.

Further review was sought in the U.S. Court of Appeals for the Seventh Circuit on September 4, 1997. The Court of Appeals was asked to consider (a) whether the matrimonial obligation was properly characterized as maintenance which would not be dischargeable in the Debtor's bankruptcy; and (b) in the alternative, if the pension obligation did in fact constitute a mere division of marital property, whether the property interest of Carol Kolodziej vested her with an independent property right to which her ex-husband Debtor had no property interest which could be affected by his Chapter 13 Bankruptcy Proceeding.

The U.S. Court of Appeals for the Seventh Circuit filed its opinion on April 17, 1998. The Court held that the characterization applied by the U.S. Bankruptcy Court and the U.S. District Court to the pension claim was correct. The Court upheld the findings below that the pension interest was a mere division of marital property, and not a protected maintenance obligation. The Court of Appeals did not comment on the alternative argument that even if the courts below were correct in their characterization of the pension obligation, that Carol Kolodziej nonetheless held a separate, vested property right in her ex-husband's pension to which the Bankruptcy process could not attach.

A Petition for Rehearing was timely filed with the U.S. Court of Appeals for the Seventh Circuit on May 1, 1998. An Order was entered by the Court of Appeals on May 26, 1998 denying the Petition.

The sum and substance of the actions taken by the federal courts below is to allow Edward Reines to retain for himself his public police pension which the State Court had determined as having a present value as of February 1, 1985 of $275,000.00. The holdings below have completely disenfranchised Carol Kolodziej from any interest in this pension even though the parties themselves had agreed that she would have a protected, vested interest in this pension for the remainder of her natural life. He has been unjustly enriched by $137,500.00 as a result of his bankruptcy filing.

ARGUMENT FOR PETITION FOR WRIT OF CERTIORARI

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED TO GUARANTEE UNIFORM TREATMENT OF MATRIMONIAL PENSION AWARDS IN BANKRUPTCY PROCEEDINGS.

The Petition for Writ of Certiorari should be granted to clarify the uniform treatment to be afforded pension interests in all bankruptcy actions wherein a Debtor attempts to utilize bankruptcy to disenfranchise his/her ex-spouse who has otherwise been awarded a pension interest in a state matrimonial proceeding. The lack of a uniform standard has led to conflicting resolutions of pension claims wherein some ex-spouses have seen their pension interests survive a bankruptcy proceeding intact, and others, as in the case at bar have seen their pension interests disappear under the guise of a dischargeable bankruptcy obligation.

Matrimonial pension awards are entitled to uniform treatment throughout all of the U.S. Bankruptcy Courts. An ex-spouse who receives a pension award should have a reasonable expectation as to how the pension will be treated if and when the other spouse seeks bankruptcy relief at a future date. Financial problems and marital discord go hand in hand. Today, it is not uncommon for a recently divorced person to seek bankruptcy relief following a marriage dissolution action to discharge the marital obligations to an ex-wife or ex-husband. This case brings this important issue vividly to life. It is a real problem facing many American families every year. The lack of uniform treatment in dealing with marital obligations in bankruptcy spawns significant bankruptcy litigation each year which can be avoided through clarification from this Court.

II.

FEDERAL BANKRUPTCY LAW TREATMENT OF PENSION AWARDS TO EX-SPOUSES.

Many federal courts have been asked to comment upon the proper treatment to be afforded the division of a pension in conjunction with a matrimonial proceeding wherein an ex-spouse ultimately seeks bankruptcy. By and large, the federal courts have attempted to uphold the enforceability and viability of state court pension divisions so as not to disenfranchise the non-debtor spouse.[2]

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[2] See, Norton Bankruptcy Law and Practice, Vol. 3 § 47.36. See also, Pension Awards in Divorce and Bankruptcy, 88 Columbia L.Rev. 194 (1988).

A significant line of case authority holds that an award of an interest in an ex-spouse Debtor's pension vests a separate and distinct property right in the non-debtor spouse which is not a part of the Debtor's bankruptcy estate under 11 U.S.C. § 541(b)(1) and (d). Attempts by Debtors to discharge their obligations to remit portions of assigned pensions have been denied. Debtors in these cases have not been allowed to utilize the bankruptcy process to diminish or eliminate that share of a pension awarded to an ex-spouse. *Gendreau v. Gendreau (In Re: Gendreau)*, 122 F.3d 815 (9th Cir., 1997). *McCafferty v. McCafferty (In Re: McCafferty)*, 96 F.3d 192 (6th Cir., 1996). *Bush v. Taylor*, 912 F.2d 989 (8th Cir., 1990). *Holland v. Knoll*, 202 BR 646 (D. Mass., 1996). *Walston v. Walston*, 190 BR 66 (E.D. N. Carolina, 1995). *Resare v. Resare*, 154 B.R. 399 (D. Rhode Island, 1993). *Carter v. Carter*, 1996 WL 374127 (N.D. Ill., 1996). *Bigelow v. Brown (In Re: Brown)*, 168 BR. 331 (B.C. N.D. Ill., 1994). *McGraw v. McGraw (In Re: McGraw)*, 176 BR 149 (S.D. Ohio, 1994). *Debolt v. Comerica Bank (In Re Debolt)*, 177 BR 31 (B.C. W.D. Pa. 1994). These cases hold that the property interests of the non-debtor spouse in the Debtor's pension are property interests which are not a part of the bankruptcy estate. Furthermore, any continuing obligations on the part of a Debtor to remit some or all of a periodic pension payment being received by the Debtor is not a "debt" owed to the former spouse as the property interest of the former spouse in the payments to be received from the Debtor has previously vested. The Debtor is merely acting as a fiduciary to receive the pension payment from the plan fiduciary, and to forward on that portion of the payment which was as-

signed to the ex-spouse as part of the marital settlement or judgment. No debtor-creditor relationship exists in these situations to give rise to a dischargeability issue under 11 U.S.C. § 523.

A second line of cases has held that an award of a periodic marital pension from a Debtor to his or her ex-spouse is to be characterized for purposes of bankruptcy law as being an obligation in the nature of support or maintenance which is non-dischargeable under 11 U.S.C. § 523(a)(5). *Dennis v. Dennis (In Re: Dennis)*, 25 F.3d 274 (5th Cir., 1994). *Erspan v. Badgett*, 647 F.2d 550 (5th Cir., 1981). *In Re: Manners*, 62 BR 656 (B.C. D Mont., 1986). *Wilson v. Wilson (In Re: Wilson)*, 158 BR 709 (B.C. S.D. Ohio, 1993). *Newcomb v. Newcomb (In Re: Newcomb)*, 151 BR 287 (B.C. M.D. Fla., 1993). *Hall v. Hall (In Re: Hall)*, 51 BR. 1002 (B.C. Ga., 1985).

III.

THIS PETITION SHOULD BE GRANTED TO CLARIFY THE STANDING OF MATRIMONIAL PENSION AWARDS AS UNIFORMLY FALLING WITHIN THE BANKRUPTCY DEFINITION OF MAINTENANCE/ SUPPORT FOR PURPOSES OF APPLYING 11 U.S.C. § 523(a)(5).

Pensions by their very nature are designed to provide retirement income to plan participants at later stages in their lives when other sources of income are likely to diminish. In this case, the parties specifically provided for Carol Kolodziej to receive a deferred retirement pension to address her future support needs. The parties by agreement specifically intended Carol Kolodziej to have a vested, secured interest in one-half of the

accrued pension fund of Edward Reines. Though the parties did not affix a label to the pension award in their Marital Settlement Agreement to call the award "maintenance", a promise of deferred income payments for one's lifetime is as close as one will get to a traditional award of matrimonial maintenance which Congress intended to protect from discharge in a personal bankruptcy proceedings under 11 U.S.C. § 523(a)(5).

The specific pension award given to Carol Kolodziej did not survive her death. It was intended only to provide her with deferred income for her life only. The parties made no attempt to value the pension at the time of their Supplemental Settlement as it was not considered by them as a part of the division of their physical assets. Carol Kolodziej herself had no pension interest at the time of the marriage dissolution in 1985, nor did she have any pension interests at the time of entry of the Supplemental Judgment for Dissolution of Marriage in 1990. The matrimonial pension awarded her by agreement of the parties was the only pension to be enjoyed by her for the remainder of her life. The monthly payment sum, which the parties determined to be approximately $700.00 per month was designed to provide supplemental income in years subsequent to the dissolution of their marriage to aid Carol Kolodziej in paying her normal living expenses. The parties incorporated into their Supplemental Judgment for Dissolution of Marriage a specific provision reserving maintenance obligations from the general discharge which they granted to each other with respect to any other lingering marital obligations. The maintenance reservation language would be entirely superfluous other than as a reference to the parties' agreement to vest Carol

Kolodziej with a protected stream of periodic income of undetermined duration.

Pension interests in general are far closer to the traditional concept of alimony, marital support and maintenance than the host of other types of marital obligations which have been characterized as "maintenance" for non-dischargeability purposes under 11 U.S.C. § 523(a)(5). Pensions traditionally provide for the receipt of regular income for support and maintenance in one's later years. The division of a pension at the time of a marriage dissolution so as to allow a non-participating spouse to enjoy some portion of the working spouse's pension does not change the quality of the pension itself. Though an actuary can assign a numeric value to a pension, the real value to a divorcing spouse is the stream of income which ultimately will be paid at a later date to meet living expenses. The sharing of a pension fund, and the stream of income to be forthcoming clearly falls within any reasonable definition of the terms "alimony, maintenance and support", especially as these terms have evolved under bankruptcy law to be far more inclusive of obligations which most would consider to be falling outside the traditional family law definition of said terms. Federal Bankruptcy law, not state matrimonial law, determines whether a particular obligation falls within the scope of obligations to be excepted from discharge under 11 U.S.C. § 523(a)(5).

The lower courts who have been called upon to interpret and apply 11 U.S.C. § 523(a)(5) have found a host of nontraditional marital obligations to fall within the bankruptcy law definition of "alimony, maintenance or support." For example:

i. The division of marital property intended by the parties to equalize a marital settlement agreement has been found to be non-dischargeable support. *Brody v. Brody (In Re: Brody)*, 3 F.3d 35 (2nd Cir., 1993).

ii. Obligations to pay a mortgage for a residence to be occupied by a debtor's ex-spouse has been found to be a support obligation which is non-dischargeability. *Joyce A. Maitlen v. Dennis Neal Maitlen (In Re: Maitlen)*, 658 F.2d 466 (7th Cir., 1981).

iii. A reimbursement of attorneys' fees in a matrimonial proceeding has been held to be a form of non-dischargeable support even though the ex-spouse recipient of the award specifically waived all rights to receive maintenance. *Russo v. Wisniewski (In Re: Wisniewski)*, 109 BR 926 (B.C.E.D. Wisc., 1990). *Wright v. Wright (In Re: Wright)*, 184 BR 318 (B.C.N.D. Ill., 1995).

iv. A hold harmless agreement to protect an ex-spouse against certain debt obligations which in themselves are clearly dischargeable has been held to be a form of non-dischargeable support. *Tavella v. Edwards (In Re: Edwards)*, 172 BR 505 (B.C.D. Conn., 1994).

v. A lump sum payment to an ex-spouse which was neither modifiable nor tax-deductible to the payer ex-spouse/debtor as is traditionally the case with maintenance awards has been held to be a form of non-dischargeable support. *Henderson v. Henderson (In Re: Henderson)*, 200 BR 322 (B.C. N.D. Ohio, 1996).

In all these cases, the courts examined the intentions of the parties at the time of the marriage dissolution, and especially the parties' intentions with respect to the underlying nature of the award and its intended pur-

pose in their marital settlement. In examining the perceived intentions, the courts have examined the parties' ages, education, incomes, other resources, placement of the award within a settlement agreement, labels used as well as a host of other factors. Interestingly, the depth of analysis is directly tied to the nature of the marital obligation to be characterized as alimony, maintenance or support. The more nontraditional the obligation which a court is attempting to place within the protection of 11 U.S.C. § 523(a)(5), the longer the analysis. Such lengthy analysis is simply not required in this case. The obligation itself is a form of traditional "alimony, maintenance or support".

It is incredible to believe that the pension obligation awarded to Carol Kolodziej is not a form of non-dischargeable maintenance in light of the host of matrimonial obligations described above which have been found to fall within the Congressionally protected class of non-dischargeable obligations set forth in 11 U.S.C. § 523(a)(5).

Though some lower courts have held that a pension award is nothing more than a non-protected division of property otherwise subject to discharge in a personal bankruptcy, such holdings fly in the face of the Congressional purpose behind 11 U.S.C. § 523(a)(5), especially in light of the nontraditional obligations which have been found to fall within the protected category which are nowhere near as close as a pension is to the most traditional definition of alimony, maintenance and support.

This case provides the Court with a unique opportunity to resolve the debate as to the proper characteriza-

tion to be given a pension, and to hold that pensions are by definition a form of "alimony, maintenance or support" which are per se non-dischargeable under 11 U.S.C. § 523(a)(5).

IV.

THIS PETITION SHOULD BE GRANTED TO CLARIFY AND PROTECT THE VESTED PROPERTY RIGHTS OF EX-SPOUSES IN STATE MATRIMONIAL PENSION AWARDS SO AS TO AVOID FUTURE DISENFRANCHISATION BY AN EX-SPOUSE'S SUBSEQUENT BANKRUPTCY.

Carol Kolodziej received a vested property interest under Illinois state law with respect to her ex-husband's Chicago Police pension which became her sole and separate property upon the entry of the Supplemental Judgment for Dissolution of Marriage on November 15, 1990. Bankruptcy was never intended by Congress to aid an ex-spouse in disenfranchising the legitimate property rights awarded to a former spouse in conjunction with a state matrimonial proceeding. Congress itself has included provisions within the U.S. Bankruptcy Code to limit a Debtor's ability to harm his family, including ex-spouses in conjunction with a personal bankruptcy. See 11 U.S.C. § 523(a)(5); 11 § U.S.C. 523(a)(15). Edward Reines is attempting to utilize his Chapter 13 Bankruptcy Proceeding to rob his ex-spouse of her vested property rights by treating his marital obligation as a mere debt to a creditor which is otherwise dischargeable in his Chapter 13 Bankruptcy Proceeding.

Edward Reines' Bankruptcy Proceeding only affects property he owned at the time he filed his petition. 11

§ U.S.C. 541(b)(1) and (d). Edward Reines claims that he owns his "entire" police pension. (Appendix H). This claim flies in the face of Illinois case law which has been interpreted by lower courts to uphold the vesting of a property interest in a pension at the time of entry of a Judgment for Dissolution of Marriage. *Carter v. Carter*, 1996 WL 374127 (N.D. Ill., 1996). *Bigelow v. Brown (In Re: Brown)*, 168 BR 331 (B.C. N.D. Ill., 1994). Federal bankruptcy law cannot be utilized to enlarge a property interest which had not previously existed prior to the commencement of a bankruptcy proceeding. Edward Reines is attempting to utilize his Chapter 13 Bankruptcy Proceeding to reclaim his entire Chicago Police pension, and to terminate the vested property rights owned by Carol Kolodziej which vested 6 years before the filing of his Chapter 13 case. This is a misuse of the Bankruptcy forum which must not be tolerated. A Debtor should not be allowed to profit through use of the U.S. Bankruptcy Code, especially when the result is to disenfranchise an ex-spouse from her legitimate property rights earned over a long marriage. *Gendreau v. Gendreau (In Re: Gendreau)*, 122 F.3d 815 (9th Cir., 1997). *McCafferty v. McCafferty (In Re: McCafferty)*, 96 F.3d 192 (6th Cir., 1996). *Bush v. Taylor*, 912 F.2d 989 (8th Cir., 1990).

CONCLUSION

This case presents questions of exceptional importance to a host of everyday Americans who must deal with the bankruptcy process subsequent to the dissolution of their marriage. The division of pensions in state court matrimonial proceedings is of critical importance to litigants who reasonably rely upon state court actions to fully protect their matrimonial interests in the pensions of their soon-to-be ex-husbands and ex-wives which were earned during the course of the marriage. The U.S. Bankruptcy Code was never intended to provide remedies by which an ex-spouse could frustrate the legitimate interests of an ex-spouse in a Debtor's pension which was properly the subject of a state court matrimonial proceeding, and equitably divided between the parties.

The award of a pension interest in conjunction with a state court matrimonial proceeding should be protected in a subsequent bankruptcy proceeding as either (a) an award of maintenance/support which is non-dischargeable; or (b) as a separate, vested property right owned by the non-Debtor spouse to which the Debtor and his estate have no interest. To hold otherwise causes disastrous consequences to occur as are illustrated only too clearly by the case at bar wherein an ex-wife of a marriage of long duration has been effectively disenfranchised from a promised pension.

This Court has the unique opportunity to clarify this important area of bankruptcy law in order to assure its uniform application in all subsequent bankruptcy proceedings wherein a marital pension award is placed at issue.

Wherefore, Carol Kolodziej respectfully requests that her Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 97-3312

IN RE EDWARD J. REINES,

Debtor.

CAROL KOLODZIEJ,

Plaintiff-Appellant,

v.

EDWARD J. REINES,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 2645—**Charles P. Kocoras,** *Judge.*

ARGUED FEBRUARY 20, 1998—DECIDED APRIL 17, 1998

Before CUMMINGS, KANNE, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* Carol (now Kolodziej) and Edward Reines were married two months to the day before President Kennedy was assassinated in 1963. They were divorced 22 years later[1] in 1985. The divorce judgment incorporated a marital settlement agreement that contained a waiver—by both parties—of maintenance of any sort.

---

[1] Mr. Reines' attorney, very competent on bankruptcy law, is apparently no whiz at math, for he tells us in his brief that the marriage lasted 18 years.

Carol remarried soon after the ink dried on the divorce judgment, and a short time later she took steps to undo the judgment, alleging that she got a raw deal because Edward, among other things, failed to fully disclose his assets. The Illinois divorce court refused to upset the judgment, but that decision was reversed on Carol's appeal. *See In re Marriage of Reines*, 184 Ill. App. 3d 392, 540 N.E.2d 394 (1st Dist. 1989).

After the judgment was reopened Edward and Carol again settled, and a "Supplemental Judgment for Dissolution of Marriage" incorporating the terms of the original marital settlement agreement was entered on November 15, 1990. The new judgment also awarded Carol a one-half interest in Edward's pension, one he held as a result of his employment as a City of Chicago police officer. Edward's pension is the focus of this appeal.

On the same day (November 15, 1990) that the divorce court entered the supplemental judgment it also entered another order, a QDRO (qualified domestic relations order in Illinois family law lingo), which provided that Carol's interest in the pension would survive Edward's death. The QDRO also provided that Carol would begin receiving pension benefits when Edward turned 50, in January of 1991.

Subsequently the parties learned that the pension benefits award was exempt from division and thus unenforceable under the Illinois Pension Code. This was not good news for Carol, so she filed another petition with the divorce court, this time asking for postjudgment relief to reassess the deal in light of the unenforceability of the pension award. The divorce court heard expert testimony from both parties regarding the value of Carol's interest in the pension. On April 11, 1995, the court entered a judgment awarding Carol $137,500 in lieu of her receiving monthly pension payments. Edward filed an appeal of this order on the issue of whether the "lump sum" nature of the award was proper, while Carol appealed the valuation of the award. We don't know the status of these Illinois appeals.

Edward subsequently filed for relief under Chapter 13 of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*). His principal unsecured creditor was Carol, whose claim, including statutory interest, has been set by the bankruptcy court at $143,539.17. Edward's Chapter 13 petition proposed treating his debt to Carol (along with his other unsecured debts) under a plan in which the payment would be pegged at 50 percent of its value.

Carol contested the dischargeability of the debt and objected to the confirmation of Edward's plan. She argued that the pension obligation due from Edward was properly classified as a lump sum maintenance award, which makes it nondischargeable pursuant to 11 U.S.C. § 523(a)(5). *See Platter v. DeKalb County*, 1998 WL 138847 (7th Cir. Mar. 26, 1998). Edward, of course, argued that the debt had nothing to do with maintenance and was dischargeable as a division of marital property.

The bankruptcy court conducted an evidentiary hearing on the dispute, with Carol and Edward as the only witnesses. Though both parties were given the opportunity to present additional evidence, each stipulated to waive further proceedings in order to expedite a ruling from the court. A month later the bankruptcy court found that the debt was best classified as a division of marital assets and thus dischargeable in the bankruptcy proceeding. Based on this conclusion the court entered a separate order confirming Edward's Chapter 13 plan. The district court affirmed the order on Carol's appeal. We now review that order *de novo*, but we give deference to the findings of fact entered by the bankruptcy judge. *See Platter*, *supra*.

The only issue on this appeal is whether the obligation owed to Carol by Edward is properly dischargeable in bankruptcy. A debt to a former spouse for alimony, maintenance, or support of the spouse or a child pursuant to a divorce decree is not dischargeable. 11 U.S.C. § 523(a)(5); *In re Maitlen*, 658 F.2d 466, 468 (7th Cir. 1981). But an indebtedness that results from a division of marital assets

is dischargeable. *In re Coil*, 680 F.2d 1170, 1171 (7th Cir. 1982). So how should Edward's debt to Carol be classified?

Section 523(a)(5) establishes three requirements that must be met before a marital obligation becomes nondischargeable in bankruptcy: (1) the debt must be in the nature of alimony, maintenance, or support; (2) it must be owed to a former spouse or child; and (3) it must be in connection with a separation agreement, divorce, or property settlement agreement. *Kinnally v. Fonnemann (In re Fonnemann)*, 128 B.R. 214, 217 (Bankr. N.D. Ill. 1991). Only the first element is in dispute. Therefore, we must decide whether Edward's obligation to Carol was intended to be in the form of maintenance or whether it was only a division of property between the spouses.

We start off with a few general observations. First, whether or not the debt is a maintenance obligation is a matter of federal bankruptcy, rather than state, law. *In re Hass*, 129 B.R. 531, 536 (Bankr. N.D. Ill. 1989); *In re Calisoff*, 92 B.R. 346, 352 (Bankr. N.D. Ill. 1988). Also, we are not bound by the labels attached to the obligation. *In re Goin*, 808 F.2d 1391, 1392 (10th Cir. 1987); *Shaver v. Shaver*, 736 F.2d 1314 (9th Cir. 1984). Next, we note that exceptions to discharge of a debt are construed strictly against a creditor and liberally in the debtor's favor. *In re Zarzynski*, 771 F.2d 304, 306 (7th Cir. 1985). Lastly, we observe that a party seeking to establish an exception to discharge bears the burden of proof. *Selfreliance Fed. Credit Union v. Harasymiw (In re Harasymiw)*, 895 F.2d 1170, 1172 (7th Cir. 1990). So the ball starts firmly in Carol's court.

How, then, is Edward's debt to be classified? The answer depends on the intent of the parties. Unfortunately for Carol, there is no clear intent *expressed* to treat the debt as maintenance in the settlement papers. And categorizing a marital debt as maintenance in the absence of an expression of intent is not a default position. So with no clear intent expressed, we must look to other factors to try and figure out what the parties had in mind. This is a difficult

task, and some courts have even devised elaborate "tests" to aid the quest. *See, e.g., In re Daulton*, 139 B.R. 708 (Bankr. C.D. Ill. 1992) (listing 20 factors). The end result of an exercise of this sort is usually a mixed bag with factors pointing in both directions. Such is the case here. Carol has several factors which auger in her favor. But so does Edward. And when we look at Edward's factors—which include such things as the fact that "maintenance" usually ends upon remarriage and this debt doesn't—we think his case has strength. We also note that the record does not show that Edward is well-off but Carol is struggling. Compare this to the situation in *Matter of Dennis*, 25 F.3d 274 (5th Cir. 1994), where a 54-year-old ex-wife with no work skills or education was pitted against her ex, a doctor with an "extremely successful medical practice" and an income of "well over a quarter of a million dollars a year," and we see that Edward's position gets stronger. *Id.* at 279. Additionally, we note that Edward and Carol's children no longer need support, another factor that lends weight to Edward's position that Carol's claim on his pension was not needed nor intended to assist her with any obligations she may have to the children.

There are other factors here that point in Edward's favor, but we need not list them all. Further, the factors that Carol relies on at most bring her position into a dead heat with Edward. And if she can do no better than that, she loses, because the burden of proof rests with her.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

[Dated August 28, 1997]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	
	)	
EDWARD J. REINES,	)	
	)	
Debtor.	)	97 C 2645
	)	
	)	
CAROL KOLODZIEJ,	)	
	)	
Plaintiff,	)	
v.	)	96 B 21172
	)	
	)	
EDWARD J. REINES,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the Court on appeal from a decision of the U.S. Bankruptcy Court for the Northern District of Illinois. Appellant asserts that the Bankruptcy Court erred in classifying the matrimonial obligation due her as a division of marital property rather than a maintenance obligation which is non-dischargeable pursuant to 11 U.S.C. §523(a)(5). For the reasons set forth below, the decision of the Bankruptcy Court is affirmed.

BACKGROUND

Appellant Carol Kolodziej ("Carol") and appellee Edward Reines ("Edward") were married on September 22, 1963. On February 1, 1985, their marriage was dissolved by a Judgment for Dissolution of Marriage entered in the Circuit Court of Cook County, Illinois (the "divorce court"). The Judgment for Dissolution incorporated a written Marital Settlement Agreement dated January 25, 1985. The Judgment for Dissolution expressly provided that both parties were barred from seeking maintenance from the other.

Carol subsequently appealed the judgment, and the Illinois Appellate Court vacated the Judgment for Dissolution and remanded the matter back to the Circuit Court. *See In Re Marriage of Reines*, 184 Ill.App.3d 392, 132 Ill.Dec. 654, 540 N.E.2d 394 (Ill.App. 1st Dist. 1989). The Appellate Court found the Judgment for Dissolution unconscionable based on Edward's failure to fully disclose his assets, the omission of certain oral agreements between the parties from the Marital Settlement Agreement, and that the agreement was consummated without Carol having the benefit of independent counsel. *Id.* at 400-01. Despite the fact that Carol did not raise the issue of her waiver of maintenance in the appeal, the Appellate Court noted that Edward's failure to disclose his assets might have deceived Carol "into disclaiming any maintenance on the part of [Edward]." *Id.* at 400.

On November 15, 1990, the divorce court entered a Supplemental Judgment for Dissolution of Marriage ("Supplemental Judgment") which incorporated the terms of the orally modified original judgment and

Marital Settlement Agreement. The Supplemental Judgment provided that Carol would receive one-half of Edward's pension. The Supplemental Judgment reiterated the previous original agreement barring the parties from seeking maintenance from the other, though this waiver did contain an exception for any maintenance obligations which were included in the Supplemental Judgment.

The divorce court also entered on this same date, pursuant to the Supplemental Judgment, a Qualified Domestic Relations Order ("QDRO"). The QDRO provided that Carol's interest in the pension would survive the death of Edward. The QDRO also provided that Carol was to begin receiving pension benefits upon Edward's fiftieth birthday in January, 1991.

The provision of Edward's pension benefits to Carol is what has ultimately spawned the issue in this litigation. Edward worked as a police officer with the Chicago Police Department during the parties' marriage, employment through which he was entitled to a pension upon retirement. The terms and conditions of the Chicago Policeman's Pension Fund are governed by the Illinois Pension Code. *See* 40 ILCS 5/5-101 et seq.

The parties later learned that the pension benefits award was exempt from division and thus unenforceable under the Illinois Pension Code. *See id.* Carol filed a petition with the divorce court seeking post-judgment relief to reassess the dissolution judgment in light of the unenforceability of the pension award. The divorce court heard expert testimony from both parties regarding the value of Carol's interest in Edward's pension. On April 11, 1995, the divorce court entered a judgment

order awarding Carol $137,500.00 in lieu of the pension benefits. Edward filed an appeal of this order on the issue of whether the "lump sum" nature of the award was proper, while Carol appealed the valuation of the award.

Edward subsequently filed for relief under Chapter 13 of the United States Bankruptcy Code (11 U.S.C. §101 et seq.) on August 13, 1996. The principal unsecured creditor is Carol, whose claim including statutory interest has been confirmed by the Bankruptcy Court in the sum of $143,539.17. Edward's Chapter 13 petition proposed to treat his debt to Carol along with his other unsecured debt under a plan in which the proposed dividend to unsecured creditors is 50%.

Carol filed a Complaint to Determine Dischargeability of Debt and an Objection to Confirmation of Chapter 13 Plan on October 23, 1996. In her complaint, Carol argued that the matrimonial obligation due from Edward is properly classified as a lump sum maintenance award and thus is non-dischargeable pursuant to 11 U.S.C. 523(a)(5). Carol asserted that Edward's Chapter 13 petition be denied since it provided for the discharge of the pension award.

On February 4, 1997, the Bankruptcy Court conducted an evidentiary hearing relative to this dispute. Carol and Edward were the only witnesses to testify at this proceeding. Though both parties were afforded the opportunity to present additional evidence on this matter, the parties stipulated to waive the submission of further evidence or argument in order to expedite a ruling from the court.

On March 6, 1997, the Bankruptcy Court entered an order granting judgment in favor of Edward Reines,

finding the outstanding marital payment was properly classified as a division of marital assets and thus dischargeable in a bankruptcy proceeding. Based on this conclusion, the Bankruptcy Court entered a separate order confirming Edward's Chapter 13 Plan.

Carol filed this appeal on March 17, 1997. While this appeal has been pending, the Appellate Court for the First Judicial District of Illinois published its opinion reversing the lump sum award and remanding the matter to the divorce court for further proceedings. *In re Marriage of Reines*, (July 21, 1997, Ill.App. 1st Dist. 1997). On August 14, 1997, Carol filed a Motion to Inform District Court of Change of Circumstances, explaining her intention to appeal the Appellate Court ruling and requesting this Court to stay its decision until such time as the Illinois Supreme Court acts on the appeal. The Court granted the Motion to Inform, but refused to stay its jurisdiction pending the state court appeal.

STANDARD OF REVIEW

In reviewing a decision of the bankruptcy court, the court's findings of fact are upheld unless clearly erroneous, its determinations of witness credibility are given due regard, and its legal conclusions are reviewed de novo. *In re Marrs-Winn Co., Inc.*, 103 F.3d 584, 589 (7th Cir. 1996), *citing* Fed.R.Bankr.P. 8013. The construction of a marital settlement agreement is either a question of law or a mixed question of fact and law, and thus is not entitled to the clearly erroneous standard. *In re Maitlen*, 658 F.2d 466, 469 (7th Cir. 1981).

DISCUSSION

The sole issue in this appeal, as it was in the Bankruptcy Court below, is whether the matrimonial obligation owed to Carol by Edward is properly dischargeable in bankruptcy. A debt to a former spouse for alimony, maintenance, or support of the spouse or a child pursuant to a divorce decree is not dischargeable in bankruptcy. 11 U.S.C. §523(a)(5); *In re Maitlen*, 658 F.2d 466, 468 (7th Cir. 1981). In contrast, an indebtedness that results from a division of marital assets is properly dischargeable. *In re Coil*, 680 F.2d 1170, 1171 (7th Cir. 1982).

Section 523(a)(5) establishes three requirements for a marital obligation to avoid discharge in bankruptcy: (1) the debt must be in the nature of alimony, maintenance or support; (2) the debt must be owed to a former spouse or child; and (3) the debt must be in connection with a separation agreement, divorce or property settlement agreement. *Kinnally v. Fonnemann (In re Fonnemann)*, 128 B.R. 214, 217 (Bankr. N.D.Ill. 1991). The parties agree that only the first element is in dispute. Therefore, the only issue facing the Court is whether Edward's obligation to Carol was intended in the form of maintenance or mere property division.

This determination of whether or not the debt is a maintenance obligation is a matter of federal bankruptcy, rather than state, law. *In re Hass*, 129 B.R. 531, 536 (Bankr. N.D.Ill. 1989); *In re Calisoff*, 92 B.R. 346, 352 (Bankr. N.D.Ill. 1988). The Court is not bound by the labels imposed on the obligation by the state tribunal, but rather must consider the substance of the obligation and the intent of the parties. *In re Goin*, 808 F.2d 1391,

1392 (10th Cir. 1987); *Shaver v. Shaver*, 736 F.2d 1314 (9th Cir. 1984). However, state law is not entirely irrelevant and can be considered in ascertaining the intent of the parties and the divorce court in creating the obligation. *In re Coil*, 680 F.2d 1170, 1172 (7th Cir. 1982).

The party seeking to establish an exception to discharge bears the burden of proof. *Selfreliance Fed. Credit Union v. Harasymiw (In re Harasymiw)*, 895 F.2d 1170, 1172 (7th Cir. 1990); *Banner Oil Co. v. Bryson (In re Bryson)*, 187 B.R. 939, 961 (Bankr. N.D. Ill. 1995). The preponderance of the evidence standard thus governs Carol's assertions that an exception to discharge is warranted. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991); *In re McFarland*, 84 F.3d 943, 946 (7th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 302, 136 L.Ed.2d 220 (1996). Exceptions to discharge of a debt are to be construed strictly against a creditor and liberally in the debtor's favor. *In re Scarlata*, 979 F.2d 21,524 (7th Cir. 1992); *In re Zarzynski*, 771 F.2d 304, 306 (7th Cir. 1985).

Under federal bankruptcy law, the critical determination in classifying an indebtedness as maintenance or property division is the intent of the parties at the time the separation agreement was executed. *In re Wright*, 184 B.R. 318, 321 (Bankr. N.D.Ill. 1995); *Tilley v. Jessee*, 789 F.2d 1074 (4th Cir. 1986). If this intent is clearly discernable from the separation agreement or the proceedings of the state court, this will control the classification of the obligation and ultimately the determination of dischargeability. *See, e.g., In re Sledge*, 47 B.R. 349 (Bankr. D.C.Va. 1981). However, such a lucid expression of intent is commonly not available,

especially in those cases that result in protracted litigation. Hence, courts have looked to various factors which are circumstantially indicative of the intended nature of the post-marital obligation. *See, e.g., In re Daulton*, 139 B.R. 708 (Bankr. C.D.Ill. 1992) (listing twenty such factors).

In the Bankruptcy Court decision below, Judge Squires employed a list of ten such factors in concluding that the matrimonial obligation in this case was intended to be a property settlement as opposed to a maintenance obligation. *In re Reines* (Memorandum Opinion, March 6, 1997, pp. 7-8). Though the factors considered by Judge Squires certainly seem comprehensive and accurately reflect those that have proven persuasive in prior precedent of this Circuit, this Court is charged with a de novo review of the legal question of how Edward's debt should be classified. Thus, a thorough reconsideration of the facts attendant to the creation of this obligation is necessary to determine its proper characterization.

In her brief, Carol argues that the clear intent of the parties in creating the original pension obligation was to design a form of deferred maintenance to her. Carol is correct in asserting that the failure of the parties and divorce court to affix a specific "maintenance" label to the obligation is not dispositive of the characterization it should now receive. *See, e.g., In re Brody*, 3 F.3d 35, 38 (2d Cir. 1993). Likewise, Carol also correctly points out that the fact that this obligation was later modified to a lump-sum payment is also not conclusive of the nature of the obligation, as the law specifically provides for maintenance awards to be granted "in gross" as well as with periodic payments. See 11 U.S.C. §504(a); *see*

also In re Swate, 99 F.3d 1282 (5th Cir. 1996). These arguments, however, are not conclusive of a maintenance obligation, and do not constitute the persuasive evidence that Carol must present to meet her burden of proof.

Carol also asserts that the absence of an unequivocal waiver of maintenance in the 1990 Supplemental Judgment, as compared with the original 1985 dissolution agreement which did include an unequivocal waiver, is clearly indicative of the parties intent to create a maintenance obligation. In fact, both judgments contain a waiver of maintenance, though the waiver in the Supplemental Judgment includes an additional clause prefaced by the phrase "[E]xcept as herein otherwise provided. . ." Carol contends that the inclusion of this additional language indicates that the added pension award was intended as maintenance for Carol. Though such an interpretation certainly seems reasonable, it is equally plausible to conclude that the failure of the parties to identify the pension award as maintenance would render this waiver exception inapplicable. Thus, the waiver language in the Supplemental Judgment neither supports nor defeats Carol's contentions in this case.

Carol raises several other contentions in support of her argument that the parties intended a maintenance obligation. First, Carol notes that the 1990 pension award of continuing payments was to terminate upon her death, a fact which would tend to indicate a maintenance award. Second, Carol argues that the parties intended that all payments would be taxable to her as is required for maintenance or alimony obligations. Finally, Carol asserts that the 1990 Supplemental

Judgment treated the pension award separately from the division of the marital assets, which would again be indicative of a maintenance intention.

Carol's assertions, as recognized by other courts and by Judge Squires in the decision below, certainly do have some merit in the proper classification of Edward's obligation. However, a review of the facts surrounding the creation of the obligation reveals that equally plausible counter arguments for these factors exist to balance any weight they might have in supporting the Court's decision in this case.

First, although the original 1990 pension award was to terminate upon Carol's death, it was not likewise to terminate on her remarriage, and she did in fact remarry subsequent to the judgment. This is significant since most courts consider whether the termination of a payment obligation is predicated on remarriage as well as on the death of a party. *See, e.g., In re Daulton*, 139 B.R. 708. Additionally, the reconstitution of the pension award as a lump sum payment in the 1995 judgment did not similarly condition this payment on Carol's lifetime. Thus, the facts of when Edward's obligation was to terminate do not clearly indicate how the payments should be classified.

Second, Carol's assertion that the payments would be taxable to her is wholly without evidentiary support in the record. Carol points to no evidence that the parties intended that any payment would be taxable to her or a tax write-off for Edward. Carol's adamant assertions that the parties intended such tax treatment cannot satisfy her burden of proof. Thus, this factor is also unpersuasive.

Finally, the construction of the Supplemental Judgment does not, as Carol contends, clearly indicate that the parties intended Edward's obligation to be maintenance. In fact, the Court finds that a more persuasive interpretation of the Supplemental Judgment weighs towards a property division. The pension award is not included in any section of the judgment entitled maintenance, nor does it adjoin the section for child support, which is certainly maintenance, of the judgment. The fact that it is treated separately could merely be reflective of its belated addition to the marital division, or could simply signify the difficulty in assessing its value as compared to the other marital assets. Therefore, the form of the Supplemental Judgment also does not support Carol's case.

Although Carol repeatedly contends that the parties "clearly" intended a maintenance obligation, this Court is not convinced that Carol has presented sufficient evidence to claim an exception to discharge in bankruptcy. On the contrary, the Court is persuaded that the evidence in fact reveals Edward's obligation to be a division of marital property.

When faced with the proper characterization of the marital division of a pension or retirement benefit, courts have split on a case-by-case analysis of the facts underlying the dissolution agreement. *See, e.g., In re Albert*, 187 B.R. 697 (Bankr. D.Kan. 1995), *appeal denied* 194 B.R. 907 (property); *In re Zrubek*, 149 B.R. 631 (Bankr. D.Mont. 1993) (property); *In re Portaro*, 108 B.R. 142 (Bankr. N.D.Ohio 1989) (maintenance); *In re Dennis*, 25 F.3d 274 (5th Cir.), *cert. denied* 513 U.S. 1081, 115 S.Ct. 732, 130 L.Ed.2d 636 (1994) (maintenance). A prevailing factor in many of these decisions,

however, is the presence or absence of a disparate level of earnings between the ex-spouses and a showing of need by the claimant spouse. *See, e.g. In re Dennis*, 25 F.2d at 279 (court found maintenance obligation where wife had not worked outside the home in 28 years and had no work skills, while husband was a doctor earning a large salary); *In re Drennan*, 161 B.R. 661 (Bankr. E.D.Ark. 1993) (disparity of employment and earning capacity of parties held conclusive of maintenance obligation). This factor is critical because a maintenance or support obligation is commonly granted only when such circumstances are demonstrated.

An award of maintenance and support is meant to provide assistance to an exspouse in purchasing necessary goods or services. *In re Calisoff*, 92 B.R. 346, 352 (Bankr. N.D.Ill. 1988). When presented with the issue of whether a discharge in bankruptcy is appropriate, many courts have held that the parties' relative financial circumstances is the critical inquiry in determining the intent of the parties in creating a post-marital obligation. *See e.g., In re Sampson*, 997 F.2d 717 (9th Cir. 1993). In this case, Carol presented no evidence, to either the divorce court or the Bankruptcy Court, displaying a need for alimony or maintenance to assist her in the continuation of her life. Nor was any evidence offered indicating any differential in income between Edward and Carol illustrating any need for a maintenance award. Neither has any evidence been presented showing Carol to be in poor physical or emotional health. Finally, the ex-couple's children have reached the age of majority, another factor indicative that the payments were not needed nor intended to assist with support.

Carol attributes this lack of evidence to the fact that such evidence is usually not part of a divorce court record. Numerous decisions of federal bankruptcy courts citing such evidence seriously undermines the strength of this assertion. *See, e.g., In re Elkhahtih*, 108 B.R. 650 (Bankr. N.D.Ill. 1989); *In re Dennis*, 25 F.3d 274. It is this lack of evidence, along with the considerations previously discussed, which convinces this Court that Carol has not satisfied her burden of showing an exception to discharge in bankruptcy is warranted in this case.

Thus, this Court holds that the marital obligation owed by Edward is properly characterized as a division of marital property. This obligation is therefore dischargeable in Edward's bankruptcy proceeding pending in the Bankruptcy Court below. In light of this conclusion, Edward's Chapter 13 petition should be confirmed.

CONCLUSION

The decision of Bankruptcy Court classifying the Appellee's marital obligation as a property division, and thus dischargeable in bankruptcy, is affirmed. The order of the Bankruptcy Court confirming Appellee's Chapter 13 petition is also affirmed.

/s/ Charles P. Kocoras
Charles P. Kocoras
United States District Judge

Dated: August 28, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

In re: Edward J. Reines

Carol Kolodziej

v. Case Number: 97 C 2645 and 96 B 21172

Edward J. Reines

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the order of the Bankruptcy Court is hereby affirmed.

Date August 28, 1997

Michael W. Dobbins
Clerk

/s/
(By) Deputy Clerk

APPENDIX C

[Dated March 6, 1997]

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	Chapter 13
EDWARD J. REINES,	)	Bankruptcy No.
	)	96 B 21172
Debtor.	)	
	)	Judge
	)	John H. Squires
CAROL KOLODZIEJ,	)	
	)	
Plaintiff,	)	
v.	)	Adversary No.
	)	96 A 01482
	)	
EDWARD J. REINES,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the complaint filed by Carol Kolodziej ("Carol") against Edward J. Reines ("Edward") to determine the dischargeability of a debt owed to her pursuant to 11 U.S.C. § 523(a)(5). For the reasons set forth herein, the Court grants judgment in favor of Edward and finds the debt dischargeable as it is in the nature of a debt arising from a property settlement between the parties.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and General Rule 2.33(A) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

II. FACTS AND BACKGROUND

Carol and Edward were married on September 22, 1963. They adopted two children. On February 1, 1985, their marriage was dissolved in the Circuit Court of Cook County, Illinois pursuant to a Judgment for Dissolution of Marriage. *See* Exhibit A to Complaint. The Judgment for Dissolution provided that both parties were barred from seeking maintenance from the other. The Judgment for Dissolution also incorporated a Marital Settlement Agreement wherein both parties waived maintenance from the other.

Carol subsequently took an appeal of that Judgment for Dissolution. The Illinois Appellate Court vacated the Judgment of Dissolution and remanded the matter to the Circuit Court. *See In re Marriage of Reines*, 184 Ill.App.3d 392, 132 Ill.Dec. 654, 540 N.E.2d 394 (1st Dist. 1989). The Appellate Court vacated the Judgment for Dissolution as unconscionable based on Edward's failure to disclose fully his assets, as well as his retention of an attorney who counseled both spouses. The court noted that Edward's failure to fully disclose his assets prior to entering into the Marital Settlement Agreement with Carol deceived her "into disclaiming any maintenance on the part of [Edward]." 184 Ill.

App.3d at 402, 132 Ill.Dec. 654, 540 N.E.2d at 400. Carol testified, however, that when she brought the motion to vacate the Judgment for Dissolution, she did not raise the issue of her waiver of maintenance.

On November 15, 1990, a Supplemental Judgment for Dissolution of Marriage (the "Supplemental Judgment"), which incorporated the Marital Settlement Agreement, was entered into by the parties. *See* Exhibit B to Complaint. The Supplemental Judgment awarded Carol one-half of Edward's pension. *See* Exhibits B, Article III, ¶ 3.1 and C. This pension award is the focus of the instant dispute.

During the parties' marriage and subsequent matrimonial litigation, Edward was a police officer with the Chicago Police Department through which employment he acquired a pension funded by the City of Chicago. The terms and conditions of the police pension are governed by the Illinois Pension Code. *See* 40 ILCS 5/5-101 *et seq*.

The Supplemental Judgment reiterated the original Judgment of Dissolution of Marriage barring the parties from seeking maintenance from the other. *See* Exhibit B, Article VII, ¶ 7.4 and p. 4 ¶ 3. Attached to the Supplement Judgment was an order withholding $460.00 per month from Edward's paycheck. The withholding order states that the matter is before the court "to secure payment of support and/or maintenance (hereinafter maintenance)." *Id.* Both Edward and Carol testified, however, that the order was for the child support payments required elsewhere in the Marital Settlement Agreement and not for Carol's maintenance or alimony.

On November 15, 1990, pursuant to Article III, ¶ 3.1 of the Supplemental Judgment, the Circuit Court entered a Qualified Domestic Relations Order providing that Carol's interest in the pension fund would survive the death of the Debtor. *See* Exhibit C to Complaint. That order referenced "the property settlement executed relative to the distribution of property between [the parties]." *Id.*

Further, on Carol's petition to modify the Supplemental Judgment, the Circuit Court entered an order on April 11, 1995 providing a lump sum payment to her of $137,525.00, which is that court's liquidation of the amount owed her by Edward. *See* Exhibit D to Complaint.

Edward filed a Chapter 13 petition on August 13, 1996. He proposes to treat the subject debt along with his other unsecured debt under a plan in which the proposed dividend to unsecured creditors is 50%. Carol has objected to confirmation because under 11 U.S.C. § 507(a)(7), if the debt is found to be alimony, support, or maintenance owed her, Edward's plan does not propose to pay the entire amount as required by 11 U.S.C. § 1322(a)(2).

Carol filed the instant complaint on October 23, 1996. She argues that the pension award is in the nature of maintenance and hence non-dischargeable under § 523(a)(5). Carol maintains that the sum is properly characterized as a lump sum maintenance award that was fashioned by the state court to address an extraordinary inequity which had arisen subsequent to the entry of the parties' Supplemental Judgment, wherein it was discovered that certain pension benefits other-

wise awarded to Carol were unenforceable. Edward, on the other hand, contends that the award was in the nature of a property settlement and thus is dischargeable.

On February 4, 1997, the Court heard evidence from both parties relative to the instant dispute as well as to a companion motion for relief from the automatic stay. The Court afforded the parties the opportunity to present additional evidence on this matter, but neither party indicated a desire to so proceed. At a continued confirmation hearing on February 21, 1997, a representative of the Standing Chapter 13 Trustee advised that all elements necessary for confirmation of Edward's plan were present, save the instant determination.

III. APPLICABLE STANDARDS

The party seeking to establish an exception to the discharge of a debt bears the burden of proof. *Self-reliance Fed. Credit Union v. Harasymiw (In re Harasymiw)*, 895 F.2d 1170, 1172 (7th Cir. 1990); *Banner Oil Co. v. Bryson (In re Bryson)*, 187 B.R. 939, 961 (Bankr. N.D. Ill. 1995). The United States Supreme Court has held that the burden of proof required to establish an exception to discharge is a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991); *In re McFarland*, 84 F.3d 943, 946 (7th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 302, 136 L.Ed.2d 220 (1996); *In re Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994). To further the policy of providing a debtor a fresh start in bankruptcy, "exceptions to discharge are to be construed strictly against a creditor and liberally in favor of a debtor." *Goldberg Secs., Inc. v. Scarlata (In re Scarlata)*,

979 F.2d 521, 524 (7th Cir. 1992) (quoting *In re Zarzynski*, 771 F.2d 304, 306 (7th Cir. 1985)). *Accord Meyer v. Rigdon*, 36 F.3d 1375, 1385 (7th Cir. 1994).

Section 523 of the Bankruptcy Code enumerates specific exceptions to the dischargeability of debts. Carol contends that the subject debt constitutes maintenance or support and as such is non-dischargeable under § 523(a)(5), which provides in relevant part:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
>
> > (5) to a spouse, former spouse . . . for alimony to, maintenance for, or support of such spouse . . . in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement. . . .

11 U.S.C. § 523(a)(5).

A debt owed to a former spouse or a debt to be paid to a third party in the nature of alimony, maintenance, or support pursuant to a divorce decree is non-dischargeable in bankruptcy under § 523(a)(5). *See In re Coil*, 680 F.2d 1170, 1171 (7th Cir. 1982); *Maitlen v. Maitlen (In re Maitlen)*, 658 F.2d 466, 468 (7th Cir. 1981); *Bradaric v. Bradaric (In re Bradaric)*, 142 B.R. 267, 269 (Bankr. N.D. Ill. 1992). Obligations that arise as part of the division of marital property, however, are dischargeable. *Coil*, 680 F.2d at 1171. "An award of maintenance and support is meant to provide an ex-spouse with necessary goods or services which he or she

would otherwise not be able to purchase." *Calisoff v. Calisoff (In re Calisoff)*, 92 B.R. 346, 352 (Bankr. N.D. Ill. 1988) (citation omitted).

The determination of whether a debt is in the nature of alimony, maintenance, or support is a matter of federal bankruptcy law rather than state law. *Haas v. Haas (In re Haas)*, 129 B.R. 531, 536 (Bankr. N.D. Ill. 1989); *Seidel v. Seidel (In re Seidel)*, 48 B.R. 371, 373 (Bankr. C.D. Ill. 1984). In making this determination, the Court must look to the substance of the obligation and not to labels imposed by state law. *See Maitlen*, 658 F.2d at 468; *Doss, Puchalski, Keenan & Bargiel, Ltd. v. Cockhill (In re Cockhill)*, 72 B.R. 339, 341 (Bankr. N.D. Ill. 1987). This is not to say, however, that state law is irrelevant. On the contrary, state law may in fact provide relevant guidance. *See Calisoff*, 92 B.R. at 352. Thus, "it is the basis for creation of the obligation which determines whether it was intended as an equalization of property rights or as support and maintenance." *In re Woods*, 561 F.2d 27, 29 (7th Cir. 1977) (citations omitted).

Section 523(a)(5) sets out three requirements that must be met in order for a debt to be non-dischargeable: (1) the underlying debt must be in the nature of alimony, maintenance, or support; (2) the debt must be owed to a former spouse or child; and (3) the debt must be incurred in connection with a separation agreement, divorce, or property settlement agreement. *Kinnally v. Fonnemann (In re Fonnemann)*, 128 B.R. 214, 217 (Bankr. N.D. Ill. 1991) (citations omitted).

Of the three elements, only the first element is in dispute. There is no dispute that the debt is owed by

Edward to Carol, his former spouse, and that it was incurred in connection with the Supplemental Judgment, which incorporated their Marital Settlement Agreement.

In determining whether a debt is in the nature of support or maintenance or whether it is properly characterized as a division of property, courts have considered the following factors:

> (1) whether the obligation terminates upon the death or remarriage of either spouse (termination of the obligation indicates the obligation was for support);
>
> (2) whether the obligation is payable in a lump sum or in installments over a period of time (obligation spread over time indicates the obligation was for support);
>
> (3) whether the payments attempt to balance the parties' income (payments to balance income indicate the payments were for support);
>
> (4) the characterization of the obligation in the decree (obligations described as support indicate the obligation was for support);
>
> (5) the placement of the obligation in the decree (obligations under the heading support indicate the obligation was for support);
>
> (6) whether there is any mention of support payments (separate mention of support payments indicates the obligation is not for support);
>
> (7) whether there are children who need support (if children are of the age when support is required, this indicates the payments may be for support);

(8) whether there is a large differential in net income (a large differential in income would indicate the payments were for support);

(9) whether the obligation was thought to be taxable to the recipient (payments thought to be taxable indicate the payments were for support); and

(10) waivers of maintenance.

See Woods, 561 F.2d at 29-30; *Maitlen*, 658 F.2d at 468-69; Coil 680 F.2d at 1172; *Wright v. Wright (In re Wright)*, 184 B.R. 318, 321 (Bankr. N.D. Ill. 1995); *Daulton v. Daulton (In re Daulton)*, 139 B.R. 708, 710 (Bankr. C.D. Ill. 1992). The critical and principal inquiry is whether the intent of the divorce court and the parties was to provide support or divide marital property and debts. *Elkhatib v. Elkhatib (In re Elkhatib)*, 108 B.R. 650, 652 (Bankr. N.D. Ill. 1989).

IV. DISCUSSION

Edward testified that based on his understanding, both parties waived maintenance in the Marital Settlement Agreement, incorporated by reference in the original Judgment for Dissolution of Marriage and the Supplemental Judgment, because of the various properties awarded the parties. Carol testified she gave nothing to Edward for her interest in his pension, but admitted that her interest therein did not change or terminate in the event of either party's change in income, marital status, or upon either party's death. The Circuit Court's Qualified Domestic Relations Order references the subject pension award to Carol in terms of a property settlement, indicative of that court's

intent regarding the nature of the award. This is the only evidence in the record clearly indicating the intent of the state court respecting the pension award.

Using the factors cited above, the Court finds that the pension fund award has more characteristics of a property settlement than a maintenance award. First, the obligation was intended to survive the parties' death or remarriage, which is indicative of a property settlement. Second, the payment was to be made in a lump sum and not as periodic payments, again more indicative of a property settlement. Third, there is no indication in this record that the award was based upon disparate incomes of the parties. Fourth, the pension award was not included in the Marital Settlement Agreement under Article I entitled "Child Support and Custody," nor was it characterized as support, alimony, or maintenance in the decretal language incorporated in the Supplemental Judgment. Fifth, it was contained in the Marital Settlement Agreement under Article III entitled "Pension Plan" and not with any of the support obligations. Further, the Qualified Domestic Relations Order characterized the award as a division of property and not as an award of maintenance. Sixth, there was no evidence that the pension fund award was needed by Carol to support herself. Seventh, there was no evidence that at the time of the entry of the Supplemental Judgment the award was needed by Carol to insure a home for her or their children. Eighth, there was no evidence of a large differential in net income between the parties by which the obligation was designed to provide Carol with needed support for herself at the time of the entry of the Supplemental Judgment. Ninth, there was no indication in the record to show that the

parties intended the pension award to be or thought it to be taxable to Carol for income tax purposes.

Most telling is the waiver language contained in the Supplemental Judgment and the Marital Settlement Agreement. Under Article VII, ¶ 7.4 thereof, each party relinquished, released, and waived rights of maintenance. Additionally, both parties expressly waived maintenance for themselves, "except as herein otherwise provided." The use of such quoted language did not serve ipso facto to indicate that the pension award to Carol was really in the nature of alimony, maintenance, or support for her. The Supplemental Judgment and Marital Settlement Agreement made no express provisions whatsoever for maintenance for Carol.

In light of the foregoing, the Court holds and concludes that the pension fund award is more in the nature of a property settlement rather than an award of maintenance for or support of Carol. Hence, the Court grants judgment in favor of Edward and finds the debt dischargeable.

V. CONCLUSION

For the foregoing reasons, the Court hereby grants judgment in favor of Edward and finds the debt dischargeable. Based on the recommendation of the Standing Chapter 13 Trustee, and in the absence of any other objections to confirmation, a separate order will be entered confirming Edward's Chapter 13 plan.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall

be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

/s/ John H. Squires
John H. Squires
United States Bankruptcy Judge

DATE: March 6, 1997

cc: See attached Service List

Service List

CAROL KOLODZIEJ v. EDWARD J. REINES
Adversary No. 96 A 01482

Jerome W. Pinderski, Jr., Esq.
Pinderski & Pinderski, Ltd.
115 West Colfax Street
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M. Scott Michel
United States Trustee
227 West Monroe Street
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Jack McCullough
Chapter 13 Trustee
224 South Michigan
Suite 310
Chicago, IL 60604

C-14

[Dated March 6, 1997]

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	Chapter 13
EDWARD J. REINES,	)	Bankruptcy No.
	)	96 B 21172
Debtor.	)	
_____	)	Judge
	)	John H. Squires
CAROL KOLODZIEJ,	)	
	)	
Plaintiff,	)	
v.	)	Adversary No.
	)	96 A 01482
	)	
EDWARD J. REINES,	)	
	)	
Defendant.	)	

ORDER

For the reasons set forth in a Memorandum Opinion dated the 6th day of March 1997, the Court hereby grants judgment in favor of Edward J. Reines and finds the subject debt dischargeable under 11 U.S.C. § 523(a)(5) as it is in the nature of a debt arising from a property settlement between the parties. Based on the recommendation of the Standing Chapter 13 Trustee, and in the absence of any other objections to confirmation, a separate order will be entered confirming the Chapter 13 plan of Edward J. Reines.

C-15

ENTERED:

John H. Squires
United States Bankruptcy Judge

DATE: March 6, 1997

[service list omitted in printing]

APPENDIX D

[Entered November 15, 1990]

IN THE CIRCUIT COURT
OF COOK COUNTY ILLINOIS
COUNTY DEPARTMENT -
DOMESTIC RELATIONS DIVISION

IN RE THE MARRIAGE OF:	)	
	)	
CAROL J. REINES,	)	
	)	
Petitioner,	)	
and	)	No. 85 D 2056
	)	
	)	
EDWARD J. REINES,	)	
	)	
Respondent.	)	

SUPPLEMENTAL JUDGMENT FOR DISSOLUTION OF MARRIAGE

This cause having come on for hearing and having been resolved by agreement, the Petitioner having appeared by STEPHEN K. MILOTT, the Respondent having appeared by MELVYN H. BERKS, the Court having heard the evidence (a certificate of which is filed herein) FINDS:

A. That this Court has jurisdiction of the parties hereto, and the subject matter hereof.

B. That Petitioner was a resident of the State of Illinois at the time the Petition for Dissolution of Mar-

riage was commenced, and has maintained such residence in the State of Illinois for at least ninety (90) days, next proceeding the findings of the within Judgment for Dissolution of Marriage.

C. That on February 1, 1985, a Judgment for Dissolution of Marriage was granted to the parties, as well as a Settlement Agreement entered into by the parties, and incorporated into said Judgment for Dissolution of Marriage.

D. That on May 12, 1989, the Appellate Court vacated the Settlement Agreement incorporated into the Judgment for Dissolution of Marriage. Further, that this matter was remanded to the Trial Court, to determine issues of property division and support.

E. The parties were lawfully married on September 22, 1963, at Chicago, Illinois, and said marriage was registered in Cook County, Illinois.

F. That as a result of the marriage, two (2) children were adopted by the parties, namely, TODD, presently twenty (20) years of age, and BRETT, presently seventeen (17) years of age. That no other children were adopted by the parties, and the Petitioner is not presently pregnant.

G. That the Petitioner is ____ years of age, and presently employed.

H. That the Respondent is 49 years of age, and presently employed.

I. That Petitioner has proven the material allegations contained in the Petition for Dissolution of Marriage by substantial competent relevant evidence, and a Judgment for Dissolution of Marriage has been entered herein.

J. The parties hereto have entered into an oral Marital Settlement Agreement. Said agreement has been found to be fair, and is as follows:

ARTICLE I

Child Support and Custody

1.1 Wife shall have the sole care, custody, control and education of the minor child of the parties, namely, BRETT REINES. That the parties acknowledge that said child is currently in a program at Forest Hospital. That at such time as the minor child is released from Forest Hospital, Wife shall have the sole care and custody of said child.

1.2 That while the minor child, BRETT, remains in the program at Forest Hospital, or any other hospital, or educational institutional setting, Husband and Wife shall split equally those expenses incurred for the benefits of the minor child, not paid for by the State of Illinois, the Board of Education or other insurance benefits. Parties shall follow procedures of husband's insurance carrier, except in cases of emergencies.

1.3 At such time as the minor child BRETT, commences living with Wife, Husband shall pay unto Wife, as and for child support, an amount equal to TWENTY (20%) PERCENT of his net income, until such time as said child graduates high school, so long as said child is enrolled in high school full-time. If said child reaches eighteen (18) years of age and is not enrolled full-time in high school, child support shall terminate.

1.4 The parties acknowledge that TODD, is enrolled at Columbia College, in Chicago, Illinois. Further, both parties have agreed to divide equally between them-

selves, one-half (1/2) of said child's educational expenses, including, but not limited to registration fees and books.

1.5 That said child must be engaged in a full-time course of study, designed for a specific degree program. That as a prerequisite to Husband's requirement to contribute, as per Paragraph 1.4 above, TODD must maintain an overall "C" average. In addition, said child has an obligation to at least attempt part-time employment while enrolled in school. Further TODD must apply for all available student loans, grants, as well as any other source of income or assistance available for educational expenses. TODD must provide proof to husband that he in fact has applied for the above mentioned assistance for education as well as attempts in seeking part-time employment.

1.6 That if said child earns additional money, due to any part-time employment, any funds above and beyond his day to day needs shall be applied towards his college expenses, prior to any obligation of the parties herein.

1.7 Husband shall maintain health insurance coverage for the minor child as long as said child is enrolled full-time in high school. Wife shall follow husband's insurance carrier's procedures in all instances. If wife obtains secondary health insurance, she shall notify husband of same.

ARTICLE II

Real Property

2.1 The parties acknowledge that they are the joint owners of real property located at 6808 W. Ardmore,

Chicago, Illinois. Husband shall convey unto Wife, any and all interest he may in said property located at 6808 W. Ardmore, Chicago, Illinois.

2.2 Wife shall hold Husband harmless on any mortgage obligation or debt due on said property. Wife shall make all of said mortgage payments, as they become due, and shall hold Husband free, harmless and indemnified for any payments due thereof.

2.3 Husband waives any and all interest he may have in any tax or insurance escrow being maintained, relative to said premises.

2.4 The parties acknowledge that they are the joint owners of real estate located at 1509 N. Kolin, Chicago, Illinois. Husband shall convey unto Wife, by Quit Claim Deed, any and all interest he may have in said property.

2.5 Wife shall hold Husband harmless on any mortgage obligation or debt due on said property. Wife shall make all of said mortgage payments, as they become due, and shall hold Husband free, harmless and indemnified for any payments due thereof.

2.6 Husband waives any and all interest he may have in any tax or insurance escrow being maintained, relative to said premises.

2.7 The parties acknowledge that they may have an interest in real estate located at 7527 N. Osceola, Chicago, Illinois. Husband shall convey unto Wife, by Quit Claim Deed, any and all interest he may have in said property.

2.8 Wife shall hold Husband harmless on any mortgage obligation or debt due on said property. Wife shall make all of said mortgage payments, as they become

due, and shall hold Husband free, harmless and indemnified for any payments due thereof.

2.9 Husband waives any and all interest he may have in any tax or insurance escrow being maintained, relative to said premises.

2.10 Wife shall pay unto Husband, the sum of EIGHTY THREE THOUSAND SEVEN HUNDRED and No/100 ($83,700.00) DOLLARS, as and for his interest in the said real estate, within sixty (60) days from the entry of this Judgment.

2.11 That in the event Wife fails to pay Husband as hereinabove stated, Wife shall be charged seven (7%) percent interest on the above mentioned sum. That if an additional thirty (30) days pass, Wife shall be charged nine (9%) interest on the above mentioned sum.

2.12 That Husband shall Quit Claim the properties, pursuant to Paragraphs 2.1, 2.4, and 2.7 of this Article II, unto Wife, upon receipt of EIGHTY THREE THOUSAND SEVEN HUNDRED and No/100 ($83,700.00) DOLLARS, to be received by Husband from Wife, pursuant to Paragraphs 2.10 and 2.11 of this Article II, representing any and all interest Husband has in said properties, referred to hereinabove.

ARTICLE III

Pension Plan

3.1 Wife shall receive one-half (1/2) of Husband's pension through his employment with the City of Chicago, Chicago Police Department, based on the value of said pension on February 1, 1985. Said pension plan shall be subject to a Qualified Domestic Relations

Order, to be prepared and entered subsequent to the entrance of this Judgment for Dissolution of Marriage.

ARTICLE IV

Automobiles

4.1 Husband shall be the sole owner, without claim of the Wife to the 1989 Dodge. Husband shall hold Wife harmless for any and all expenses relating to the ownership and operation of said automobile.

4.2 Wife shall be the sole owner, without claim of the Husband to the 1976 Cadillac automobile. Wife shall hold Husband harmless for any and all expenses relating to the ownership and operation of said automobile.

4.3 That upon the entry of any Judgment for Dissolution of Marriage, based upon this agreement, the parties shall execute whatever documents are necessary in order to effectuate the agreement contained in this Article.

ARTICLE V

Attorneys Fees

5.1 Husband and Wife shall each pay and be responsible for the payment of their own attorneys fees and court costs in connection with these proceedings.

ARTICLE VI

Miscellaneous Property

6.1 Husband shall receive as his sole and exclusive property, the twenty-three foot Thunderbird Boat, and

Wife waives any and all interest she may have in said boat.

6.2 Husband shall receive the checking account, savings account and credit union account, or any other accounts standing in his name since February 1, 1985, free and clear of any interest of Wife.

6.3 Wife shall receive the checking account, savings account, and credit union account, or any other accounts standing in her name since February 1, 1985, fee and clear of any interest of Husband.

ARTICLE VII

Execution of Documents

7.1 That each of the parties hereto hereby agrees to execute and acknowledge, concurrently with the execution hereof, good and sufficient instruments necessary or proper to vest the titles and estates in the respective parties hereto, as hereinabove provided, and hereafter, at any time and from time to time to execute and acknowledge any and all documents which may be necessary or proper to carry out the purposes of this Agreement and establish of record the sole and separate ownership of the several properties of said parties in the manner herein agreed and provided. If either party hereto for any reason shall fail or refuse to execute any such documents, then this Agreement shall, and it is hereby expressly declared to, constitute a full and present transfer, assignment and conveyance of all rights hereinabove designated to be transferred, assigned and conveyed and a full, present and effective relinquishment and waiver of all rights, hereinabove designated to be relinquished and waived and each party agrees for

himself that a Judge of the Circuit Court of Cook County, can execute a deed of conveyance or other legal instrument in his or her behalf in order to carry out the full import and intention of this agreement without further notice to either party.

7.2 Except for the terms herein concerning the support, custody, education or trade school of the minor child, this Agreement shall not be changed, modified or altered by any Order of Court after this Agreement has been incorporated into a Judgment for Dissolution of Marriage, or after it has become effective by the entry of any Judgment for Dissolution of Marriage by reason of which this Agreement becomes effective.

7.3 This agreement may be amended by mutual agreement of the parties any time hereafter. Any such amendments shall be reduced to writing, dated and signed by both of the parties, and shall specifically provide that it is intended to alter or amend this Agreement. No oral agreement shall be effective to in any manner modify or waive any terms or conditions of this Agreement. This Agreement shall be construed under the general laws of the State of Illinois, irrespective of the later domicile or residence of the Husband or Wife.

7.4 To the fullest extent by law permitted to do so, and except as herein otherwise provided, each of the parties does hereby forever relinquish, release, waive and forever quit claim and grant to the other, his or her heirs, personal representatives and assigns, all rights of maintenance (formerly known as alimony), dower, inheritance, distribution, community interest and all other right, title, claim, interest and estate as Husband and Wife, widow or widower, or otherwise, by reason of the marital relationship existing between the parties

hereto, under any present or future law, or which he or she otherwise has or might have or be entitled to claim in, to or against the property and assets of the other, real, personal or mixed, or his or her estate, whether now owned or hereafter in any manner acquired by the other party, or whether in possession or in expectancy, and whether vested or contingent, and each party further covenants and agrees for himself or herself, his or her heirs, personal representatives, grantees, devisees or assigns, for the purpose of enforcing any or all of the rights relinquished under this Agreement; and further agrees that in the event any suit shall be commenced, this release, when pleaded, shall be and constitute a complete defense to any such claim or suit so instituted by either party hereto; and agrees to execute, acknowledge and deliver at the request of the other party, his or her heirs, personal representatives, grantees, devisees or assigns, any or all such deeds, releases or other instruments and further assurances as may be required or reasonable requested to effect or evidence such release, waiver, relinquishment or extinguishment of such rights; provided, however, that nothing herein contained shall operate or be construed as a waiver or release by either party to the other of the obligation on the parties of the other to comply with the provisions of this Agreement, or the rights of either party under this Agreement.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AND THE COURT BY VIRTUE OF THE POWER AND AUTHORITY THEREIN VESTED, AND THE STATUTE IN SUCH CASE MADE AND PROVIDED, DOES ADJUDGE AS FOLLOWS:

1. The oral Marital Settlement Agreement between the Petitioner and Respondent as herein above set forth in full, is made a part of this Judgment for Dissolution of Marriage; and all of the provisions of said Agreement are expressly ratified, confirmed, approved and adopted as the Orders of this Court to the same extent and with the same force and effect as if said provisions were in this paragraph set forth verbatim as the Judgment of this Court; each of the parties hereto shall perform under the terms of said Agreement.

2. Each of the parties hereto will, promptly upon demand by the other party, execute and deliver to such other party any and all documents that may be necessary to effectuate and fulfill the terms of this Judgment.

3. Any right, claim, demand or interest of the parties in and to maintenance for themselves, whether past, present or future, and in and to the property of the other, whether real, personal or mixed, of whatsoever kind and nature and wheresoever situated, including, but not limited by homestead, succession and inheritance, arising out of the marital relationship or any other relationship existing between the parties hereto, except as expressly set forth in the aforesaid Agreement, is forever barred and terminated, except as hereinafter agreed to in the Marital Settlement Agreement attached hereto.

4. That this Court finds the Marital Settlement Agreement reasonable.

5. This Court expressly retains jurisdiction of this cause for the purpose of enforcing all the terms of this Judgment for Dissolution of Marriage, including the

terms of the Marital Settlement Agreement incorporated herein.

6. That this Court finds that there is no just reason to delay the enforcement of this Judgment.

ENTER:

Charles J. Grupp
Judge

DATED: _____

APPROVED:

_____
Petitioner, CAROL J. REINES

_____
Respondent, EDWARD J. REINES

MELVYN H. BERKS
Attorney for Respondent
701 Lee Street
Des Plaines, Illinois 60016
(708) 296-0460

[Entered November 15, 1990]

APPENDIX E

[Entered November 15, 1990]

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

Attorney Code: 22678

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT -
DOMESTIC RELATIONS DIVISION

IN RE: THE MARRIAGE OF	)	
	)	
CAROL REINES, now known as KOLODZIEJ	)	
	)	
Petitioner,	)	
and	)	No. 85 D 2056
	)	
EDWARD REINES,	)	
	)	
Respondent.	)	

QUALIFIED DOMESTIC RELATIONS ORDER

WHEREAS, by order issued November 15, 1990, the marriage of Carol Reines, now known as Kolodziej and Edward Reines has been dissolved; and

WHEREAS, in connection with the property settlement executed relative to the distribution of property between Carol Kolodziej and Edward Reines, certain retirement benefits earned by Edward Reines are to be transferred to Carol Kolodziej.

IT IS HEREBY ORDERED:

1. Fifty percent (50%) of the monthly benefits accrued by Edward Reines under the Policeman's Annuity and Benefit Fund, City of Chicago (hereinafter referred to as the "FUND"), determined as of February 1, 1985, shall be paid to Carol Kolodziej commencing upon Edward Reins' earliest retirement age, and ending with the monthly payment as of the first day of the month coincident with or next preceding her date of death. The amount of such monthly benefits shall be reduced by actuarial equivalent factors presently under the FUND to reflect the early commencement of such benefits.

2. During the period commencing on the date of this Order and ending on the death of Edward Reines, Carol Kolodziej shall be treated as the surviving spouse of Edward Reines for the purposes of the preretirement death benefit provisions of the FUND, but only with respect to the monthly accrued benefits earned by Edward Reines as of February 1, 1985.

3. The last known mailing address of Edward Reines is 5933 Northwest Highway, Apt. 121, Chicago, Illinois 60631. His Social Security number is 346-34-8396.

4. The mailing address of Carol Kolodziej is 6808 W. Ardmore, Chicago, Illinois 60631. Her Social Security number is 349-36-8518.

5. It is intended that this Order will qualify as a Qualified Domestic Relations Order under the Internal Revenue Code of 1986, as amended (the "Code") and the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and the provisions hereof shall be administered and interpreted in conformity with such Act.

6. The Court retains jurisdiction to amend this Order only for purposes of establishing or maintaining its qualification as a Qualified Domestic Relations Order the Code and ERISA; provided that no amendment of this Order shall require the FUND to provide any type or form of benefit, or any option, not otherwise provided by said FUND.

7. A copy of this Order shall be promptly communicated to the Administrator of the FUND by Carol Kolodziej or her counsel.

BY THE COURT:

Charles J. Grupp
JUDGE

Stephen K. Milott
Attorney for Petitioner
203 N. LaSalle, Suite 1650
Chicago, Illinois 60601
(312) 641-1981
Attorney Code: 22678

[Entered November 15, 1990]

APPENDIX F

[Dated April 11, 1995]

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT -
DOMESTIC RELATIONS

IN RE: THE MARRIAGE OF CAROL REINES, now known as CAROL KOLODZIEJ,	)	
Petitioner,	)	
and	)	No. 85 D 2056
EDWARD REINES,	)	
Respondent.	)	

ORDER

This matter having come on for hearing on petitioner's petition to modify the supplemental judgment for dissolution, due notice having been give, an evidentiary hearing having been conducted, the parties having submitted memoranda of law, the Court having considered alternative solutions, under its equitable powers, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED THAT:

(1) Article III, Sec. 3.1 of the supplemental judgment for dissolution proves as follows:

"3.1 Wife shall receive one-half (1/2) of Husband's pension through his employment with the City of

> Chicago, Chicago Police Department, based on the value of said pension on February 1, 1985. Said pension plan shall be subject to a Qualified Domestic Relations Order, to be prepared and entered subsequent to the entrance of this Judgment for Dissolution of Marriage."

(2) Sections 1 and 2 of the Qualified Domestic Relations Order provide:

> "1. Fifty percent (50%) of the monthly benefits accrued by Edward Reines under the Policeman's Annuity and Benefit Fund, City of Chicago (hereinafter referred to as the 'Fund'), determined as of February 1, 1985, shall be paid to Carol Kolodziej commencing upon Edward Reines' earliest retirement age, and ending with the monthly payment as of the first day of the month coincident with or next preceding her date of death. The amount of such monthly benefits shall be reduced by actuarial equivalent factors presently under the Fund to reflect the early commencement of such benefits.
>
> 2. During the period commencing on the date of this Order and ending on the death of Edward Reines for the purposes of the preretirement death benefit provisions of the Fund, but only with respect to the monthly accrued benefits earned by Edward Reines as of February 1, 1985."

(3) The Chicago Policemen's Annuity and Benefit Fund has refused to recognize the QDRO, as it is not enforceable under the Illinois Pension Code. Ill. Rev. Stat. 108 1/2, §3-101, et seq., and *In Re Marriage of Roehn*, 216 Ill. App.3d 891 (2d Dist. - 1991).

(4) Petitioner seeks entry of an order granting her a lump sum payment based upon "the present value of her share of the pension, valued as of February 1,

1985." (Petition, p.2). Petitioner's expert witness, Mr. Lawrence Krupp, placed the value of petitioner's one-half (1/2) at $239,227.00.

(5) Respondent, at the evidentiary hearing, contested the petitioner's expert's opinion as to petitioner's (1/2) share of respondent's pension, based on the February 1, 1985 valuation. Responded called his own expert witness, Mr. Sandor Goldstein, who placed the value of Petitioner's share at $137,525.00.

(6) The Court, in informal conferences with the parties and their attorneys, suggested entry of an order that would attempt to provide petitioner with a monthly annuity which would, to the extent possible, approximate and implement the original intention of the parties and the Court as set forth in the supplemental judgment and QDRO.

(7) Both parties, through their attorneys, expressed objections to the Court's proposal.

(8) The Court, therefore, feels constrained to rule on the present petition and respondent's objections thereto, in a manner that is consistent with the issues as raised by the parties at the evidentiary hearing. That is, to determine the lump sum value of petitioner's one-half (1/2) share, determined as of February 1, 1985, based upon the expert testimony presented by the parties.

(9) The Court finds that respondent's expert witness was more qualified and more experienced than the petitioner's expert.

Therefore, the Court determines the value of petitioner's share accordingly.

Wherefore, the supplemental judgment for dissolution is hereby modified to provide for a lump sum payment from respondent to petitioner, in the amount of $137,525.00, in lieu of the unenforceable pension and QDRO provisions of said judgment.

DATED: [April 11, 1995]

ENTERED:

Judge Lester A. Bonaguro

APPENDIX G

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 26, 1998

Before

Hon. Walter J. Cummings, *Circuit Judge*
Hon. Michael S. Kanne, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

No. 97-3312

In re EDWARD J. REINES,

Debtor,

CAROL KOLODZIEJ,

Plaintiff-Appellant,

v.

EDWARD J. REINES,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois.
No. 97 C 2645—**Charles P. Kocoras**, Judge.

ORDER

On May 1, 1998, the plaintiff-appellant filed a petition for rehearing. All the judges on the original panel have voted to deny the petition. The petition is therefore DENIED.